

In the Matter of the Appeal by)	BOARD DECISION
)	
CALIFORNIA INTEGRATED WASTE)	
MANAGEMENT BOARD)	
)	
)	PSC NO. 99-02
From the Executive Officer's decision dated)	
September 23, 1999 disapproving its contract)	
with Price Waterhouse Coopers)	
)	March 7, 2000

BEFORE: Ron Alvarado, Vice President; Richard Carpenter and William Elkins, Members.

The California Integrated Waste Management Board (CIWMB) has appealed from the Executive Officer's decision dated September 23, 1999, which disapproved CIWMB's contract (Contract) with Price Waterhouse Coopers (PWC) to collect and compile confidential information submitted by plastic products manufacturers. In this decision, the State Personnel Board (SPB or Board) finds that the Contract was not justified under either Government Code § 19130(b)(3) or § 19130(b)(10), and sustains the Executive Officer's decision disapproving the Contract.

BACKGROUND

The Rigid Plastic Packaging Container (RPPC) statute¹ was enacted in 1991, to become effective on January 1, 1995.² The RPPC statute requires that plastic packaging meet certain compliance standards. One of the compliance standards that plastic packaging may meet is the “all-container recycling rate.” If the plastic packaging industry does not, in the aggregate, meet this rate in any given compliance year, then individual product manufacturers must be able to demonstrate that they have complied with other standards set forth in the statute. In order to determine whether individual product manufacturers have complied with those standards, CIWMB must collect information from manufacturers on certification forms. Some of the information that manufacturers are required to submit is proprietary or trade secret information that the manufacturers consider to be highly confidential. Public Resources Code § 42323 provides that any proprietary information that product manufactures may submit to CIWMB through the certification process “shall not be made available to the general public.”

For compliance year 1996, the all-container recycling rate was calculated using survey data collected by the Department of Conservation (DOC) from plastic recyclers and reclaimers. In early 1998, CIWMB determined that the all-container recycling rate for compliance year 1996 did not meet the legally-mandated 25% compliance rate. Because the industry, in the aggregate, did not meet the all-container recycling rate

¹ SB 235 (Hart), Stats. 1991, Chapter 769.

² Public Resources Code § 42300 et seq.

established for that compliance year, beginning in May 1998, CIWMB initiated the certification process for 500 randomly selected product manufacturers.

DOC, which had collected confidential and proprietary information from plastic recyclers and reclaimers to establish the 1996 all-container recycling rate, was not available to collect and compile proprietary certification information from product manufacturers. In May 1998, CIWMB did not have in place a process to collect and compile this information itself.³ According to CIWMB, even if it had had such a process in place, plastic products manufacturers, at that time, were unwilling to submit confidential, proprietary or trade secret information, fearing that CIWMB might release that information to their rivals, resulting in significant damage to their competitive positions. These representatives indicated that their concerns would be significantly diminished if an independent third party, such as an accounting firm that handles confidential and proprietary information on a routine basis, were to collect and compile the certification forms and data. In response to the product manufacturers' concerns, CIWMB retained PWC to collect and compile the information submitted by the manufacturers on the certification forms.

The California State Employees Association (CSEA) asserts that civil service employees should have been used to perform this work instead of an outside contractor.

³ During oral argument before the Board, CIWMB stated that it now has such a process in place and is collecting that data itself.

PROCEDURAL HISTORY

By letter dated July 31, 1998, pursuant to Government Code § 19132 and Public Contract Code § 10337(c), CSEA asked SPB to review the Contract between CIWMB and PWC for compliance with Government Code § 19130(b).

By memorandum dated September 18, 1998, CIWMB asserted that the Contract was justified under Government Code §§ 19130(b)(3) and (10).

The Executive Officer issued his decision on September 23, 1999 disapproving the Contract. CIWMB appealed to the Board from the Executive Officer's decision by letter dated October 25, 1999.

The Board has reviewed the record, including the written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.

ISSUES

1. Was the Contract justified under Government Code § 19130(b)(3)?
2. Was the Contract justified under Government Code § 19130(b)(10)?

DISCUSSION

The Contract was not justified under Government Code § 19130(b)(3)

Government Code § 19130(b)(3) authorizes a state agency to enter into a personal services contract with a private entity when:

The services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system.

CIWMB asserts that the Contract is justified under Government Code § 19130(b)(3) because CIWMB did not have a system in place, trained staff, or the confidence of the regulated plastic product manufacturers' industry to carry out effectively the task of collecting and maintaining the confidential and proprietary information the product manufacturers were required to provide. In addition, CIWMB contends that the only segment of civil service that could have reasonably gained the confidence of the industry was DOC, because of its long history of maintaining the confidentiality of plastics industry data, but DOC was not available to perform the work. According to CIWMB, these facts show that the Contract was justified under Government Code § 19130(b)(3). The Board disagrees.

Under Government Code § 19130(b)(3), a state agency may hire a private entity to perform state work when the contracted services: (1) are not available within civil service; (2) cannot be performed satisfactorily by civil service employees; or (3) are of such a highly specialized or technical nature that the necessary expert knowledge, experience or ability are not available through the civil service system.

CIWMB does not contend that the contracted services were not available within civil service or that they were of such a highly specialized or technical nature that the necessary expert knowledge, experience or ability was not available through the civil service system. The contracted services consisted of the collection and maintenance of confidential information. Such services are routinely performed by state agencies, including, as in this case, DOC. CIWMB presented no information to show that state employees did not have the requisite knowledge, experience or ability to perform such information collection and maintenance services.

Instead, CIWMB asserts that the Contract was justified under Government Code § 19130(b)(3) because CIWMB employees could not have performed the contracted services “satisfactorily.” According to CIWMB, in order to protect the confidentiality of their proprietary information, product manufacturers were prepared to violate the law and pay penalties rather than give that information to CIWMB employees and risk its being disclosed to their competitors. CIWMB asserts that, even if their employees might have had the requisite knowledge, experience or ability to collect and process the manufacturers’ proprietary information, because the manufacturers would not provide that information to CIWMB, CIWMB employees could not have performed the contracted services satisfactorily. CIWMB’s contentions misinterpret Government Code § 19130(b)(3).

Government Code § 19130(b)(3) permits contracting out when civil service employees cannot perform the work “satisfactorily,” in other words, adequately and competently.⁴ There was no evidence presented that indicated that civil service employees could not have performed the information gathering and processing services as adequately and competently as PWC. The fact that the plastic products manufacturers may not have trusted CIWMB employees sufficiently to provide confidential information to them does not mean that those employees could not or would not have complied with applicable law that mandated that the manufacturers’ proprietary information be kept confidential. Thus, CIWMB has not shown that civil service

⁴ See, Professional Engineers in California Government v. Department of Transportation (1997) 15 Cal.4th 543, 567.

employees would not have been able to perform the work “satisfactorily.” While the Board recognizes that CIWMB found itself in a difficult predicament when its efforts to collect confidential information from plastic product manufacturers were opposed, Government Code § 19130(b)(3) does not authorize a state agency to contract with a private entity when a distrustful industry refuses to submit information in compliance with the law. CIWMB has, therefore, failed to show that the Contract was justified under Government Code § 19130(b)(3).

The Contract was not justified under Government Code § 19130(b)(10)

Government Code § 19130(b)(10) authorizes a state agency to enter into a personal services contract with a private entity when:

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

According to CIWMB, the 1996 compliance year was the first year that the RPPC statute was enforced against the plastic products manufacturers. Controversy surrounding the RPPC program caused delays in the adoption of the all-container recycling rate. The 1996 all-container recycling rate was not adopted until early 1998. Beginning in May 1998, CIWMB began the 1996 certification process. Under the RPPC regulations,⁵ a product manufacturer only has to retain supporting documents for two years following the end of a compliance period. This meant that for the 1996 compliance year, manufacturers could discard their supporting data as early as

⁵ Title 14, California Code of Regulations § 17946.5.

December 31, 1998. Although CIWMB extended the retention date for another year, CIWMB believed that further delays in implementing the certification process could potentially limit its ability to take enforcement action against the selected product manufacturers, as well as create a hardship for those manufacturers that might be required to search for aging data.

CIWMB asserts that, once the all-container recycling rate for 1996 was adopted in 1998, CIWMB needed to start the certification process as quickly as possible so that enforcement action could begin as soon as possible: To delay further would have increased both the risk that manufacturers' records could have been destroyed and the difficulty in collecting old data, and would have frustrated CIWMB's ability to enforce the RPPC statute for the 1996 compliance year. CIWMB contends that these facts show that the contract was justified under Government Code § 19130(b)(10). The Board disagrees.

Government Code § 19130(b)(10) permits a state agency to contract with a private entity when, among other times, the agency's need for the contracted services is so urgent that the delay incumbent in implementing those services using civil service employees would frustrate their very purpose.

The RPPC statute was enacted in 1991, but did not become effective until 1995. The first time the enforcement provisions were implemented was in 1998. Thus, CIWMB had seven years before it began enforcing the statute to develop and put in place a process for maintaining the confidentiality of any proprietary information CIWMB employees might collect from product manufacturers.

Moreover, there is no indication that, had the product manufacturers been willing to submit the requested information to CIWMB, CIWMB would not have been able to collect and compile the submitted information as quickly and efficiently using its own employees, as it did by retaining PWC. While the Board appreciates the difficulties CIWMB faced in implementing a controversial statute with a reluctant regulated industry, the record does not support that the need for the contracted services was so urgent that CIWMB could not have implemented an information collection process using civil service employees in time to enforce the RPPC statute. CIWMB has, therefore, failed to show that the Contract was justified under Government Code § 19130(b)(10).

CONCLUSION

The Board finds that CIWMB has failed to justify the Contract under either Government Code § 19130(b)(3) or § 19130(b)(10). The Board, therefore, sustains the Executive Officer's decision disapproving the Contract.

STATE PERSONNEL BOARD⁶

Ron Alvarado, Vice President
Richard Carpenter, Member
William Elkins, Member

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⁶ President Bos and Member Harrigan did not take part in this decision.

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision at its meeting on March 7, 2000.

Walter Vaughn
Executive Officer
State Personnel Board

[CIWMB-CSEA-PSC 99-02]